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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 11

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (R. 36–40) is reported at 342 F. 2d 563. The findings of fact and conclusions of law of the district court (R. 33–34) are not reported. The report (R. 9–17) and order (R. 19–21) of the Interstate Commerce Commission are reported at 313 I.C.C. 769.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1965, and a timely petition for rehearing was denied on April 16, 1965 (R. 41–42). The petition for a writ of certiorari was filed on July 14,

1965, and granted on February 21, 1966 (R. 43, 383 U.S. 906).

STATUTES INVOLVED

Section 1 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1, provides:

> (1) CARRIERS SUBJECT TO REGULATION.
>
> The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment * * *
>
> * * * * *
>
> (c) * * * from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation * * * takes place within the United States.
>
> (2) TRANSPORTATION SUBJECT TO REGULATION.
>
> The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States * * *.
>
> * * * * *
>
> (5) JUST AND REASONABLE CHARGES.
>
> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such

service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Section 6 of the Act, 24 Stat. 380, as amended, 49 U.S.C. 6, provides in pertinent part:

> (1) SCHEDULE OF RATES, FARES, AND CHARGES; FILING AND POSTING.
>
> Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. * * *

* * * * *

Section 8 of the Act, 24 Stat. 382, as amended, 49 U.S.C. 8, provides in pertinent part:

> In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of

any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

QUESTION PRESENTED

Section 1(1) of the Interstate Commerce Act provides that the Interstate Commerce Commission has no power to regulate rail transportation outside of the United States. The basic question presented, in the view of the United States, is whether, when an American railroad establishes with either a Canadian or a Mexican railroad a joint through international rate, the Commission may find the rate to be unjustly and unreasonably high in its entirety, determine the maximum reasonable rate, and award a complaining shipper the difference as reparations. A subsidiary question is whether, and to what extent, the amount of reparations in such a case is limited by a prior Commission determination of the maximum reasonable rate that the American carrier may charge for a shipment to the place where shipments traveling under the joint through international rate cross the international border.

INTEREST OF THE UNITED STATES

1. While this case was pending on petition for a writ of certiorari, the Solicitor General was invited by the Court to submit the views of the United States (382 U.S. 803), and a memorandum setting forth our tentative views and urging that the writ be granted was filed. Further study and reflection have convinced us that, while the general approach sketched

in that memorandum is sound, the specific method we suggested for computing reparations in cases involving joint through international rates is unnecessarily cumbersome, and in some respects erroneous. A further expression of the government's views therefore seems appropriate.*

2. Congress has recognized the interest of the United States in the regulation of transportation by making the United States a party to most judicial review proceedings involving orders of the Interstate Commerce Commission. 28 U.S.C. 2322. To be sure, neither the United States nor the Interstate Commerce Commission is a statutory party to judicial proceedings for the enforcement of reparations orders, since such proceedings ordinarily involve relatively narrow issues, important only to the injured shipper and the defendant railroad and not to the public at large. 49 U.S.C. 16(2), 16(12). See, generally, *Interstate Commerce Commission* v. *Atlantic Coast Line Railroad Co.*, 383 U.S. 576. The present reparations case, however, raises major issues of public policy and statutory interpretation, touching upon the foreign commercial relations of the United States as well as upon the regulation of transportation within the United States. This is further reason for undertaking to set forth the government's views.

STATEMENT

Canada Packers, the petitioner, is a Canadian corporation which manufactures fertilizer in several

*The present brief is submitted on behalf of the United States only. The Interstate Commerce Commission is considering whether it wishes to file a statement of its own views at a later date.

plants located in Canada (R. 25). In 1948, it procured and paid for certain shipments of potash from places in New Mexico to its Canadian plants. These shipments moved by rail under joint through rates established by American and Canadian railroads having connecting lines (R. 26), and crossed the international border at Detroit and Port Huron, Michigan, among other points (R. 27).

In 1950, Canada Packers, pursuant to Section 13(1) of the Interstate Commerce Act, 49 U.S.C. 13(1), filed an informal complaint with the Interstate Commerce Commission claiming that the joint through rates under which it had made these shipments were unjust and unreasonable within the meaning of Section 1(5) of the Interstate Commerce Act (pp. 2–3, *supra*), and asking reparations (R. 27). The Commission deferred action on this complaint pending its decision in related cases, principally *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Railway Company* (ICC Docket 30578). At issue in that case was the lawfulness of rates charged by American carriers for potash shipments from the identical places in New Mexico from which the shipments in the instant case originated, to the border points—like Detroit and Port Huron—where the shipments involved in the instant matter crossed the international border *en route* to their Canadian destinations (R. 27–30). On March 18, 1957, the Commission found that these rates to the border were unreasonably high, established maximum reasonable rates therefor, and determined that shippers who had paid the unlawful rates were entitled to reparations (300 I.C.C. 87, R. 29).

After the *Consolidated Rendering* case was decided by the Commission, Canada Packers, on October 28, 1959, timely filed with the Commission a formal complaint (R. 5–9) repeating the allegations of its informal complaint. The Commission, in a report issued on May 24, 1961, held that the joint through rates under which Canada Packers had shipped from New Mexico to Canada were, as the shipper contended, unjustly and unreasonably high (313 I.C.C. 759, R. 9–17). It based its determination upon a comparison of those rates with rates which the Commission had determined to be the maximum reasonable rates for shipments of the same commodity from the same places over a comparable distance within the United States; among the rates thus used for purposes of comparison were the rates to the border involved in the *Consolidated Rendering* decision (R. 15). While disclaiming any power to prescribe for the future maximum reasonable joint rates for international shipments (R. 14), the Commission awarded Canada Packers the entire difference between the joint through rates that it had paid and what the Commission determined to be the maximum reasonable rates (R. 17, 19–21). The Commission summarily rejected (R. 16) the railroads' contention that, in so measuring the shipper's damages, the Commission was exceeding its territorial jurisdiction under Section 1(1) of the Interstate Commerce Act (p. 2, *supra*).

The railroads partially complied with the Commission's reparations order, paying Canada Packers $5,304.01 (plus interest) of the $6,694.56 specified in

the Commission's reparations order. It appears that they arrived at the $5,304.01 figure by deducting from the amount specified in the Commission's order that portion of the charges that had been retained by the Canadian railroads participating in the joint through rates. (R. 32.)

Canada Packers filed suit against the railroads[1] under Section 16(2) of the Interstate Commerce Act in a federal district court for the balance (R. 1). The district court entered judgment for the amount asked by Canada Packers (plus interest and a reasonable attorney's fees), reasoning that the American railroads' failure to establish lawful rates applicable to the transportation performed by them within the United States had compelled Canada Packers to pay the joint through international rates, and that, in consequence, the Commission was justified in awarding Canada Packers the full amount by which those rates exceeded the maximum reasonable rates as determined by the Commission (R. 33–34).

The railroads appealed, and the Court of Appeals for the Seventh Circuit reversed (342 F. 2d 563, R. 36). Referring to the Commission's *Consolidated Rendering* decision, the court of appeals noted that rates to the border had been in effect in 1948 when the shipments in question occurred, and that the Commission had found them to be unreasonably high

[1] Only the American railroads participating in the joint through rates in question were named in the district court complaint, though the Canadian carriers had been named as defendants, along with the American carriers, in the proceeding before the Commission (R. 6).

and established maximum reasonable rates. In these circumstances, the court held, Canada Packers' damages were limited to the difference between the existing rates to the border and the maximum reasonable rates therefor as determined by the Commission; any greater award, the court concluded, would exceed the Commission's territorial jurisdiction (R. 38–40). The court distinguished *News Syndicate Company* v. *New York Central Railroad Co.*, 275 U.S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654 (where American carriers had been held liable to complaining shippers for the entire difference between the joint through international rates which they had charged and what the Commission determined the maximum reasonable rates to be), on the ground that, in those cases, the carriers had not, as here, published rates to the border; hence, the shippers had been compelled to pay the joint through international rates (R. 39–40).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 1(1) of the Interstate Commerce Act, 49 U.S.C. 1(1), makes the provisions of the Act applicable to common carriers by rail engaged in transportation "from or to any place in the United States to or from a foreign country, *but only insofar as such transportation * * * takes place within the United States*" (emphasis added). Thus, if an American railroad charged a shipper merely for transportation to,

and unloading at, a point on the international border, and the shipment was then reloaded onto a Canadian railroad,[2] which levied another charge for the transportation of the shipment to its ultimate destination within Canada, the Interstate Commerce Commission would clearly be barred by Section 1(1) from attempting to regulate the charge collected or the other incidents of the transportation service furnished by the Canadian carrier, although the Commission's authority to regulate the charge levied by the American carrier would be unimpaired. But in the usual case a rail shipment between an American (or foreign) place of origin and a foreign (or American) destination is not unloaded at the border and then reloaded onto a different carrier. American and Canadian, and American and Mexican, railroads have connecting lines and arrangements for car interchanges. Shipments between places in the United States and places in these adjacent foreign countries thus can, and do, travel in a continuous movement across the international borders. Where that is done, the American and foreign carrier may agree upon a single charge for the through shipment and divide the proceeds (such a charge being known as a "joint rate", see *e.g., Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 233); or each may establish a rate, known as a "proportional rate," for its portion of the through ship-

[2] The present case involves rail transportation between the United States and Canada. Its principles are, of course, equally applicable to rail transportation between the United States and Mexico. See, *e.g., Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654.

ment.[2] In either case, a fundamental question of the limits of the Commission's regulatory authority is raised: May the Commission, notwithstanding the territorial limitation in Section 1(1), determine the lawfulness of a joint through international rate (or of a combination of proportional rates relating to a through international shipment) as a whole, and award reparations on the basis of its determination; or is it limited to determining the lawfulness of that portion of the charge applicable to the American leg of the trip? That question is inescapably presented by the instant case, and the importance of answering it correctly is manifest. A substantial traffic moves by rail between the United States and its neighbors to the south and north. Our good relations with those countries, as well as the welfare of the shippers and carriers involved in this traffic, may thus be affected by the decision here.

The basic proposition advanced in this brief is that the Commission has no power to determine what is a reasonable charge for a transportation service performed partly within a foreign country, and hence no power to determine, for reparation or other purposes, when a joint through international rate or a combination of proportional rates for an international rail shipment—in either case a charge in-

[2] A proportional rate is a charge for the use of the railroad's lines in a continuous shipment in which other railroads also participate. A "local rate", in contrast, is a charge for a shipment between two points on one railroad's lines. See, *e.g.*, *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U.S. 573, 586–588.

volving foreign transportation—is unlawful. That we think is the plain meaning of Section 1(1) of the Interstate Commerce Act, and a result required as well by considerations of comity, equity, and practicality.

This is not to say that there is no remedy against excessive charges by American carriers who operate under through international rates. On the contrary, we are clear that a shipper is entitled to the protection of the Interstate Commerce Commission against any unreasonably high charge for the part of the international shipment that takes place within the United States, and we perceive neither practical nor theoretical impediment to the Commission's readily determining what portion of a joint through international rate (or, *a fortiori,* of a combination of proportional rates) is applicable to the American portion. Where the shipment moves under a combination of proportional rates, we believe the appropriate measure of reparations is the difference between the proportional rate actually charged by the American carrier and the maximum reasonable such rate as determined by the Commission. Under a joint through rate, the American carrier does not charge a separate rate for its part of the journey, but it receives an agreed-upon division of the proceeds of the joint rate, and we propose that the amount by which such division exceeds a charge computed on the basis of the maximum reasonable rate for the American leg of the trip, as found by the Commission, be deemed the measure of the shipper's damages.

The result, under our view, is that a shipper, in a proceeding before the Interstate Commerce Commis-

sion, may recover that portion of the allegedly excessive charge that is fairly attributable to the American carrier. Of course, the proportional rate charged, or division obtained, by the foreign carrier may also be excessive, under the standards applied by the appropriate foreign regulatory authority. But that is properly a matter between the shipper and the foreign carrier or authority, and not the concern of the Interstate Commerce Commission. To thus remit the shipper to his remedies under Canadian or Mexican law against the foreign carrier with respect to any allegedly excessive charge attributable to that carrier seems to us both the dictate of the territorial limitation in Section 1(1) of the Interstate Commerce Act, and a rational and practical allocation of responsibilities as between the regulatory authorities of friendly nations.

In the present case, the Commission awarded reparations on the basis of its determination of maximum reasonable joint through international rates for the shipments in question. In so doing the Commission exceeded, in our view, its territorial jurisdiction. The district court upheld the award. The court of appeals reversed, but on questionable premises. We believe that further proceedings before the Commission are necessary to determine under proper standards the correct amount of reparations due to petitioner. Accordingly, we urge that the judgment of the court of appeals be vacated and the case remanded for appropriate further proceedings.

224-443—66——3

I. THE EXPRESS STATUTORY LIMITATION OF THE INTERSTATE COMMERCE COMMISSION'S JURISDICTION TO TRANSPORTATION WITHIN THE UNITED STATES PRECLUDES AN AWARD OF REPARATIONS PREDICATED UPON A COMMISSION DETERMINATION OF THE MAXIMUM REASONABLE JOINT RATE (OR COMBINATION OF PROPORTIONAL RATES) FOR A RAIL SHIPMENT THAT TAKES PLACE IN PART OUTSIDE OF THE UNITED STATES

A. Section 1(1) of the Interstate Commerce Act, 49 U.S.C. 1(1), authorizes the Commission to enforce the Act's provisions with respect to common carriers engaged in transportation by rail from any place in the United States to a foreign country (or vice versa), "but only insofar as such transportation * * * takes place within the United States." The language is unequivocal and its meaning, we submit, plain: The Commission has regulatory authority over international shipments only with respect to the part of the shipment that occurs within the United States.[4] *E.g., United States* v. *Pennsylvania R. Co.*, 323 U.S. 612, 620–621; *St. Louis, B. & M. R. Co.* v. *Brownsville District*, 304 U.S. 295; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660; *Hoffman-Taff, Inc.* v. *St. Louis-S. F.*

[4] The original Act did not contain the proviso quoted in the text. Act of Feb. 4, 1887, c. 104, §1, 24 Stat. 379. But, though the original Act was applicable to carriers engaged in rail transportation "from any place in the United States to an adjacent foreign country," it seems clear that extra-territorial application of the Act was not contemplated save in special instances which are not relevant here. See 17 Cong. Rec. 3723, 3725, 7281, 7286, 7753. The proviso was added by the Act of Feb. 28, 1920, c. 91, § 400, 41 Stat. 474, merely to clarify this understanding. See H. Rep. No. 456, 66th Cong., 1st Sess., p. 27; 59 Cong. Rec. 888–890.

Ry. Co., 279 I.C.C. 710; *Cosmopolitan Shipping Co.* v. *Hamburg-American Co.*, 13 I.C.C. 266.[5]

If, then, in a shipment from New York to Toronto over the connecting lines of an American and a Canadian carrier, the shipper ships goods from New York to the border on the American carrier, the goods are unloaded there and reloaded onto a Canadian carrier for the balance of the journey, and each carrier charges the shipper separately, the shipper surely cannot complain to the Interstate Commerce Commission that the rate charged by the Canadian carrier was unjust and unreasonable. For, to repeat, the Commission has been expressly denied by Congress the power to regulate transportation within Canada. We see no justification for a different result merely because the shipment travels in a continuous movement, without unloading and reloading at the border, from an American place of origin to a foreign destination, or vice versa.

Suppose that the American carrier charges a pro-

[5] *H. K. Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272, is not opposed. There Canadian and American railroads established joint through rates on certain shipments from Canada to the United States that were lower than the rates available to other consignees of such shipments, and the Commission found that the higher rates were unjust and unreasonable, unduly prejudicial, and unduly preferential, and issued a cease and desist order, limited, however, to "transportation within the United States." This Court upheld the order. Since the order affected only the American part of the transportation, it had, as the Court emphasized, no extra-territorial effect. *United States* v. *Pacific & Arctic Co.*, 228 U.S. 87, held merely that a conspiracy involving foreign carriers to restrain trade within the United States was within the reach of the Sherman Act.

portional rate (see p. 11, n. 3, *supra*) for its part of the journey and the Canadian carrier a proportional rate for its part, and the charge paid by the shipper for the through shipment is thus the combination of these rates. A proportional rate contemplates that either the shipment's point of origin, or its destination, or both, is located on the connecting line of another carrier; such a rate does not cover a complete shipment but only a portion of a shipment. In this sense, the American carrier's proportional rate, in our example, is not a charge for a domestic shipment; it is part of a charge for an international shipment. But it is precisely the part of the charge that pertains to the American leg of the trip, just as the Canadian carrier's proportional rate is the part of the total charge that covers the Canadian part of the transportation service.

It follows that where an international shipment travels under a combination of proportional rates, the Commission's regulatory authority is limited to the American carrier's proportional rate and does not extend to the proportional rate charged by the foreign carrier for its portion of the trip. *Western Peat Co.* v. *Illinois Central R. Co.*, 297 I.C.C. 273, 275; *Elliott Packing Co.* v. *Duluth, W. & P. Ry.*, 292 I.C.C. 12; *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785. If the American proportional rate is unjust and unreasonable, the shipper is entitled to relief in a proceeding before the Interstate Commerce Commission. See *Dow Chemical Co.* v. *Alton & Southern R.R.*, 284 I.C.C. 365. But the Commission would appear to have no authority to inquire into the lawfulness of the foreign proportional rate.

The result should be the same when a joint through rate, rather than a combination of proportional rates, is applicable to the international shipment. The principal difference between the two kinds of charge is that one (the joint rate) is negotiated by the participating carriers and the other (the combination of rates) is the result of independent determination by the participants (see pp. 10–11, *supra*). That difference seems irrelevant here. In either case, it is a matter of several railroads fixing their charges with reference to points of origin or ultimate destination, or both, that lie beyond their own lines. In the case of a joint rate, each carrier receives a share—termed a "division"—of the proceeds. The divisions are, for present purposes, essentially equivalent to the proportional rates that go to make up a combination of proportional rates.[6] Like a combination of proportional rates, a joint through rate for an international shipment includes a charge for a transportation service provided by a foreign carrier in a foreign country—

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[6] See, further, pp. 29–30, *infra*. We know of no case where it has been held—or where it would be reasonable to hold—that a joint through rate established simply by adding up the proportional rates between the points in question exceeded the maximum reasonable joint rate over the same route between the same points, assuming that each such proportional was just and reasonable. Indeed, joint rates are often formed merely by adding up a series of proportional rates. See, *e.g.*, *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 231. Likewise, railroads offering a combination of proportional rates have latitude in fixing their respective proportionals comparable to that they enjoy in negotiating the divisions of a joint through rate. *Refund Provisions, Lake Cargo Coal*, 299 I.C. 659, 662.

that charge being the division exacted by the foreign carrier, which is comparable to the foreign carrier's proportional rate in the case of a combination of proportional rates. It seems inescapable, therefore, that for the Interstate Commerce Commission to determine a maximum joint through international rate, no less than for it to prescribe a foreign carrier's proportional or local rate, is a regulation of foreign transportation barred to the Commission by Section 1(1) of its organic act.

The Commission has recognized as much in its consistent position, reiterated in its opinion in the present case (R. 14), that it has no power to prescribe for the future (*i.e.*, directly compel a carrier to charge) reasonable joint through international rates. *E.g., Carey Mfg. Co.* v. *Grand Trunk W. Ry.*, 36 I.C.C. 203; *Carlowitz & Co.* v. *Canadian Pacific Ry.*, 46 I.C.C. 290; *American Cyanamid Co.* v. *Director General*, 69 I.C.C. 337; *Duplex Printing Co.* v. *British Columbia Elec. Ry.*, 128 I.C.C. 692; *Pittston Paper Corp.* v. *Canadian Natl. Ry.*, 165 I.C.C. 141, 144; *Great Northern Ry. Abandonment*, 202 I.C.C. 703, 707; *Chas. H. Lilly Co.* v. *Great Northern Ry.*, 298 I.C.C. 407, 410. See, also, p. 23, n. 10, *infra*. At the same time, the Commission holds that it may determine such rates for the purpose of adjudicating reparation claims of shippers who ship under joint through international rates. R. 16–17; see, *e.g., Buckerfield's Ltd.* v. *Atchison T. & S. F. Ry.*, 280 I.C.C. 15, 18; *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710, 712; *Ryegate Paper Co.* v. *Boston & Maine R.R.*, 87 I.C.C. 673. This difference in treatment, we believe, is without support

in the Act. Section 1(1) does not provide merely that the Commission shall not issue orders prescribing for the future rates applicable to foreign transportation. It provides that *none* of the provisions of the Act is applicable to foreign transportation.[7] That must include the sections (Sections 1(5) and 12(1)) that permit the Commission to make a determination of maximum reasonable rates for the purpose of awarding reparations to complaining shippers.

B. The Commission's position that for reparation purposes it may determine the reasonableness of a joint through international rate as a whole seems to us unsound in policy as well as contrary to the territorial limitation in Section 1(1) of the Interstate Commerce Act. *First,* the Commission would appear to be ill equipped to make determinations regarding the reasonableness of charges exacted by a foreign carrier for foreign rail transportation. The Commission claims no expertise with respect to the costs and other conditions of foreign rail transportation. Yet it assumed without any discussion in the instant case that Canadian railroad conditions are so akin to those in this country that a rate for a shipment having its origin in the United States and its destination in Canada that exceeds the maximum reasonable rate for the same kind of shipment over a comparable distance completely within the United States must be unreasonably high.

[7] For a limited exception to this principle; see n. 12, *infra*, p. 25.

Second, questions of expertise aside, it seems improper for the Commission, for any purpose, to judge the reasonableness of a foreign transportation charge in disregard of the legal standards administered by the foreign regulatory agency having authority over such charges. In the long run such a practice may produce unnecessary friction among the nations involved.

Third, the Commission's position may prove unfair both to shippers and to carriers. It is unfair to shippers because it may deny them the benefit of low Canadian and Mexican rates. Under the Commission's view, though the American carrier exacts a charge that is unlawfully high under the standards of the Interstate Commerce Act, the shipper is entitled to no reparations if the foreign charge is so low that the joint rate, considered as a whole, is reasonable under the standards of the Act. In such a case the shipper derives no benefit from the Canadian carrier's low charge,[8] and the American carrier obtains a windfall by being permitted to collect an excessive charge without any penalty.

The Commission's position may also result in unfairness to American carriers that participate in joint through international rates. They are made fully liable for any excess over the maximum reasonable joint rates as determined by the Commission, although

[8] That Canadian rates may indeed often be low by American standards is suggested by the fact that Canadian law makes no provision for minimum rate regulation of railroads. Canadian railroads may therefore be freer than American railroads to lower their rates for competitive or other reasons.

that excess may be due entirely to a Canadian or Mexican carrier whose practices are outside the control of the Interstate Commerce Commission. The American carriers, to be sure, need not participate in such rates; but the public is the poorer if this flexible and widely used technique of railroad rate-making is thereby discouraged (see p. 36 and n. 22, *infra*).

C. We are mindful that the Commission's position has support in decisions of this Court, the leading case being *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179, decided in 1927 in an opinion by Mr. Justice Butler. There, a shipper complained to the Commission that a joint through international rate under which it had shipped commodities was unjust and unreasonable. The Commission agreed that the rate was too high, determined the maximum just and reasonable rate, and awarded the entire difference as reparations. This Court upheld the Commission's reparation order. The Court first noted that the carrier had published no rate to the border. This, the Court reasoned, was a violation of the Interstate Commerce Act, resulting in the shipper's being compelled to pay the joint through international rate; therefore the rate was subject to scrutiny under the standards of the Act.[9]

[9] This initial step causes great difficulty. We fully agree that if a shipper is charged a joint through international rate, that rate is subject to the Commission's jurisdiction at least to the extent of the American carrier's division of the proceeds of the rate. But we cannot accept the apparent implication of the Court's opinion that, had the American carrier also published a proportional rate to the border, it could thereby have escaped

The second—and critical—step in the Court's reasoning in *News Syndicate* was the assertion that, since the shipper was compelled (due to the absence of any other rate) to pay the joint through international rate, he was entitled to look to the American carrier for reparations if that rate was found to be excessive. We grant that insofar as the joint through international rate necessarily involves a

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all liability in respect of the joint rate. *First*, we find nothing in the Act that requires an American carrier to publish such a proportional rate, or prohibits it from entering, instead, into a joint rate. Therefore, we do not understand on what theory the Court predicated the Commission's power to scrutinize the joint through international rate in its entirety on the carrier's failure to publish a proportional rate. *Second*, even if the American carrier had published such a rate, it probably would still have been required by law to charge the joint rate. See *Hardy* v. *Galveston, H. & S.A. Ry. Co.*, 169 I.C.C. 790. It is well settled that the anti-discrimination provisions of the Act forbid a carrier to charge different rates on the same kind of shipment moving over the same route between the same points (*e.g.*, *B. & O. S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 172; *Pittsburgh etc. Ry. Co.* v. *Fink*, 250 U.S. 577, 581), and that—in the event such alternatives are offered—a joint rate takes precedence over a combination of proportionals and so is the only lawful rate as between shipper and carrier. *E.g.*, *Larabee Flour Mills Corp.* v. *Atchison, T. & S. F. Ry.*, 168 I.C.C. 335, 339. *Third*, we see no reason to exonerate a carrier of all liability in respect of a joint through international rate merely because it offers an alternative rate as well. We believe that the Act entitles shippers to pay no more than the maximum reasonable charge, as determined by the Interstate Commerce Commission, for transportation within the United States—no matter in what form that charge is levied. (See 49 U.S.C. 1(5)).

Notwithstanding *News Syndicate*, the Commission has taken the position that an American carrier may not limit its liability under a joint through international rate by also offering a reasonable proportional rate (see n. 20, p. 35, *infra*); we think this is sound.

charge for the American leg of the trip, the shipper is entitled to relief if that charge is unjust and unreasonable. Obviously, though, such a rate also includes a charge for a foreign transportation service, and for the Commission to determine whether the entire rate is just and reasonable thus involves the Commission in passing judgment on a charge exacted by a foreign carrier for transportation in a foreign country.

The Court found justification for this anomalous result [16] in the doctrine of joint tortfeasors' liability. In *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, the Court had held that a shipper injured by having to pay an unreasonably high joint rate could obtain full reparations in a suit against any one of the participating carriers, they being (in this respect at least) joint tortfeasors. The Court in *News Syndicate* relied on this reasoning. But *Sloss Sheffield* had involved a domestic—not an international—joint rate. The difference is critical. The Commission has unquestioned jurisdiction to pass upon the lawfulness of a domestic joint rate in its entirety; and, if such a rate is found to be lawful, it makes good practical and legal sense to hold each carrier fully liable for the excessive charge, rather than compel the shipper to sue the several participants. But this assumes, of course, that the joint

[16] It seems particularly anomalous in light of the Court's later holding, in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660, that the "Act does not empower the Commission to prescribe or regulate" joint through international rates. See p. 13, *supra*.

rate is, in fact, unlawful. Otherwise, there would be no occasion to apply the joint-tortfeasor doctrine; there would be no tort. We believe it improper to so assume in the case of a joint through *international* rate, where a key component of the charge—namely, the division exacted by the foreign carrier—is wholly outside the Commission's jurisdiction, and where the very question is the Commission's power to determine the lawfulness of the entire rate.

Not only have we no quarrel with the reasoning or result in *Sloss-Sheffield;* we would agree with *News Syndicate* that, in the case of a joint through international rate, too, since the American carrier and the foreign carrier have agreed among themselves on a single rate for the entire international journey, they should be deemed jointly liable if the rate is excessive. So much, surely, is unexceptionable—but it merely poses, rather than answers, the essential question whether and in what sense such a rate is excessive.

An example will illustrate. Suppose that a joint rate between New York and Toronto was arrived at by the participating carriers in the following manner. The American carrier, properly applying the standards of the Interstate Commerce Act, correctly determined what it might lawfully charge as a proportional rate between New York and the point at which the shipment to Toronto would cross the border; the Canadian carrier, properly applying Canadian legal standards [11]—which, let us hypothesize, are interpreted

[11] Chapter 234, § 328(1) of the Revised Statutes of Canada, 1952, Vol. IV, provides that the Canadian Board of Transportation "may disallow any tariff or any portion thereof that it con-

by the Canadian Board of Transportation to authorize higher rates than the Interstate Commerce Commission would deem just and reasonable—determined the charge that would be just and reasonable for its portion of the journey; and the joint through international rate was simply the sum of these two amounts (divisions). In such a case, the Commission, under the rule of *News Syndicate,* would apply the standards of the Interstate Commerce Act and find the rate as a whole unjustly and unreasonably high, even though the American and the foreign carrier had each determined its part of the rate by correctly applying the legal standards of the country having jurisdiction of its portion of the trip. In these circumstances, surely, to label the American and Canadian carriers "joint tortfeasors" because the rate as a whole is unjust and unreasonable under American standards, and to compel the American carrier to pay the entire difference between the rate actually charged and the Commission's conception of a maximum reasonable rate, is both unfair to the carriers and manifestly opposed to the letter and spirit of Section 1(1) of the Interstate Commerce Act, which requires the Commission to confine its regulatory activities to the United States.[12]

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siders to be unjust and unreasonable, or contrary to any provisions of this Act * * *."

[12] We point out that where Congress has desired to make American carriers liable in respect of the portion of a through transportation service taking place outside the United States, it has done so expressly. See Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11).

We believe, in short, that the Commission has no power to pass upon the lawfulness of a joint through international rate. As next we show, that does not mean that one who ships under such a rate has no remedy if the American carrier employs the joint through rate device to overcharge the shipper, in violation of American standards of a just and reasonable rate, for the part of the trip that takes place on the American side of the border.[13]

II. THE PROPER MEASURE OF DAMAGES DUE BY THE DOMESTIC CARRIER ON A JOINT THROUGH INTERNATIONAL SHIPMENT IS THE AMOUNT BY WHICH THE DIVISION OF THE JOINT RATE ACTUALLY RECEIVED BY THE AMERICAN CARRIER EXCEEDS THE MAXIMUM REASONABLE RATE FOR THE AMERICAN LEG OF THE TRIP, AS DETERMINED BY THE COMMISSION

A. If we are correct in our suggestion that the Commission has no authority to determine maximum reasonable rates for an international through ship-

[13] *News Syndicate*, to our knowledge, has been followed in only one later decision of this Court, *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, though *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458 (discussed *infra*, pp. 27–29), applied a similar principle in a related context. In *Lewis-Simas-Jones*, involving a joint through international rate from a point in Mexico to a point in the United States, the American carrier had published a rate from the border, but it was only a local rate, which contemplated that the shipment would originate at the border rather than in Mexico—a rate, in short, applicable to local, not through, service. Since it had published no proportional rate applicable to its portion of the international through shipment, the carrier had in the Court's view violated the Interstate Commerce Act, thereby empowering the Commission to scrutinize in its entirety the joint through international rate that the shipper had been compelled to pay (283 U.S. at 663).

ment, it does not follow that a shipper is remediless where the American carrier's charge for the American leg of the trip is excessive. There should be no problem where the shipment travels under a combination of proportional rates. If the shipper believes that the American carrier's proportional rate is unlawful under the standards of the Interstate Commerce Act, he should file a complaint with the Interstate Commerce Commission; the Commission has full power both to prescribe for the future the maximum reasonable proportional rate, and to award the shipper reparations for past injury if he was compelled to pay a rate in excess of what the Commission determines was the maximum reasonable rate. If the shipper believes that the Canadian carrier has charged a proportional rate for the Canadian leg of the trip that is excessive under Canadian standards, the appropriate remedy is an action against the Canadian carrier under the pertinent laws of Canada.[14] This is an especially appropriate solution in a case like the present, where the shipper is itself a corporation chartered by and doing its principal business in the foreign country in question. But, in any event, we think Section 1(1) establishes that the Interstate Commerce Commission has no jurisdiction over Canadian or Mexican rail rates.

This approach was disapproved—we think erroneously—in *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458, which involved rail traffic between Canada and

[14] See *British American Oil Co.* v. *Grand Trunk Ry. Co.*, 9 Can. Ry. Cas. 178; *British American Oil Co.* v. *Canadian Pacific Ry.*, 12 Can. Ry. Cas. 327.

the United States that moved under a combination of Canadian and American proportional rates. The shipper brought a proceeding before the Interstate Commerce Commission charging that the American proportional rate was unjustly and unreasonably high. He did not allege, however, that either the Canadian proportional rate, or the combination of proportional rates—the total charge that he paid for the shipment—was unjust and unreasonable, and this Court held that consequently he could recover no damages even if the American proportional rate was indeed unreasonable. In the Court's view, while the Commission could prescribe a maximum reasonable proportional rate for the future, the shipper had not proved any injury entitling him to reparations, because he had failed to challenge the combination of rates as a whole. Conceivably, the excessive charge for the American leg of the trip might have been completely offset by an unreasonably low charge for the Canadian leg.

An example will indicate our difficulty with this reasoning. Suppose the American proportional rate was unjustly and unreasonably high by the standards of the Interstate Commerce Act, and the Canadian proportional rate unjustly and unreasonably high by Canadian regulatory standards. Under the rule in *Sullivan,* the shipper would still have to prove that the combination of rates as a whole was unreasonably high by American standards, and, if he failed in this proof, he would be entitled to no damages, even though the Canadian and the American carriers each exacted an illegal charge from him. This anomaly is simply

the converse of that produced by the Court's reasoning in *News Syndicate* [15]—that a shipper may be entitled to reparations with respect to an international through shipment even though the respective charges levied by the American and the foreign carrier are perfectly lawful under the regulatory standards of their respective countries (see pp. 24–25, *supra*). Both situations exemplify the inappropriateness of the Commission's basing an award of reparations upon the application of American standards of just and reasonable rates to all segments of an international rail shipment.

B. Where such a shipment travels under a combination of rates, the portion of the total charge that relates to the American leg of the trip can be readily determined; it is simply the proportional rate charged by the American carrier. We submit that there is no materially greater difficulty in determining the proper allocation of the charge for an international rail service where the carriers offer a joint rate rather than a combination of rates. Although a joint rate is a single undivided charge for the through shipment, the proceeds are divided among the participating carriers, and their shares (divisions) are essentially equivalent to the proportional rates in a combination of rates. As the Court observed in *Sullivan,* "[t]he

[15] The *Sullivan* opinion relies heavily on *News Syndicate. Sullivan* involves the additional anomaly that if the Canadian proportional is so low as to make the combination reasonable by American standards, the result is that the low Canadian rate inures to the benefit of the American carrier, not the shipper; it is a shield which protects the American carrier from liability for having charged an unreasonably high rate.

proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate." 294 U.S. at 463, citing *Morrell & Company* v. *New York Central R. Co.*, 104 I.C.C. 104, 128. See, also, *Through Routes and Through Rates*, 12 I.C.C. 163, 166; and pp. 10, 11, 17, *supra*.

Accordingly, where a shipper complains that he has been charged an excessive joint rate for a through international shipment, we think he must prove, not that the entire rate is unjust and unreasonable by the standards of the Interstate Commerce Act, but that the division received by the American carrier—the charge for the American leg of the trip [16]—exceeds the maximum reasonable proportional rate for that leg. See 44 Harv. L. Rev. 300–301. In other words, assuming that the sum of the divisions of a joint rate may be roughly equated with the sum of the proportional rates in a combination of proportional rates, we propose a similar test of liability for both types of international through charge.[17]

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[16] In an unusual case, perhaps, the division might not be fairly representative of the American carrier's charge for its portion of the through shipment under the joint rate. We would recognize discretion in the Commission to make appropriate adjustments in such cases.

[17] Under such a test, it is necessary that shippers enjoy ready access to American carriers' divisions of joint through international rates. If a shipper cannot discover what the American carrier's division is, he cannot know whether he may be paying an excessive charge. Failing other methods, the Commission could doubtless require that such divisions be published. See 49 U.S.C. 6(5)–(6); *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660 n.

Some language in *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, gives trouble here. In that case, a domestic joint through rate had been constructed by combining the existing proportional rates between the points in question (269 U.S. at 231), and a shipper brought an action against one of the participating carriers charging that the joint rate was unjust and unreasonable and seeking full reparations from that carrier. The carrier argued that it was liable for only so much of the excessive charge as it had received under its divisions agreement with the other participating carriers. The court rejected the argument, stating (269 U.S. at 234):

> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed was reasonable. It may be reasonable although some of the factors, or the divisions of the participants, were unreasonable. * * *

We think this language must be viewed in its context—a joint through rate which, because it involved a trip wholly within the United States, was fully subject to the regulatory jurisdiction of the Interstate Commerce Commission. If a shipper has been forced to pay a joint through rate that the Commission properly determines to have been unjustly and unreasonably high, of course he has been injured in the entire amount that the joint through rate exceeds the maximum reasonable rate. As noted earlier (p.

23, *supra*), it is entirely reasonable in such a case that the shipper have an expeditious remedy for the entire excessive charge against any of the participating carriers. But, as we have been at pains to emphasize, it is misleading to speak of a joint through rate pertaining to an *international* rail shipment as being unjust and unreasonable under the Interstate Commerce Act, since at least one of the carriers participating in the rate is not subject to the Act with respect to its portion of the trip, but subject, rather, to a foreign regulatory authority applying its own standards of rate-making. Unless both the American and foreign carrier, in setting the rate, demanded and obtained divisions in excess of reasonable compensation under the regulatory standards of their respective jurisdictions for the portion of the through service rendered by each, the joint rate as a whole cannot be regarded as excessive or unlawful.

In such a case it must be viewed as a combination of charges and its lawfulness made to turn upon the lawfulness of each component charge. If the American carrier demanded and received a division in excess of the maximum reasonable proportional rate that it could have charged, under a combination of proportional rates, for its part of the same shipment, it has committed a wrong under American regulatory standards and the shipper is entitled to redress. That wrong is neither diminished nor enlarged by

what the Canadian carrier charges.[18] If the Canadian carrier has exacted a division that, under Canadian standards, exceeds the maximum reasonable proportional rate for the Canadian leg of the journey, it likewise has wronged the shipper and the shipper has remedies under Canadian law.

III. APPLICATION OF THE FOREGOING PRINCIPLES TO THE FACTS OF THIS CASE REQUIRES A REVERSAL OF THE COURT OF APPEALS' JUDGMENT AND FURTHER PROCEEDINGS BY THE COMMISSION

In the present case, the Commission, for the purpose of determining the liability of the respondent railroads to the petitioner shipper, undertook to determine maximum reasonable rates for shipments of potash between places in New Mexico and places in Canada. We believe this was improper. The Commission should have determined the maximum reasonable proportional rates for the American portions of these shipments, and awarded the shipper the difference between a charge so computed and the divisions (if greater) received by the railroads from the joint through rates under which the shipments in question moved. The respondents in this case, apparently, have assumed that this is precisely what the Commission did in the *Consolidated Rendering* proceeding, which involved rates for similar shipments from the

[18] Thus, if the Canadian carrier's division constitutes a very low charge by American standards for the Canadian part of the journey, that should in no way reduce the shipper's recovery in an action against the American carrier. He is entitled to the full benefit of the low Canadian charge.

identical places in New Mexico to the border points—Detroit, Port Huron and elsewhere—at which Canada Packers' shipments crossed *en route* to their Canadian destinations (Statement, *supra,* pp. 6–8). Thus, it appears, in computing the damages that they owed Canada Packers, respondents simply subtracted the charges deemed reasonable maxima in *Consolidated Rendering* from the divisions they actually received on Canada Packers' shipments.

It is not entirely clear, however, that the *Consolidated Rendering* proceeding involved proportional rates, and thus fairly determined the reasonable charge for the American leg of a trip whose destination was not a place on the border but places within Canada—for a through not a local service (see n. 3, p. 11, *supra*).[18] We believe, therefore, that the judgment of the court of appeals should be vacated, and the case returned to the district court to be held there while the shipper seeks clarification of this issue from the Commission. Should it turn out that the *Consolidated Rendering* decision did determine the maximum reasonable rates for the American segment of the through shipments in question, and that respondents properly subtracted the amounts they could have

[18] We point out that in some cases—for example, where through service is relatively infrequent—a railroad may be permitted to charge a local rate for its portion of the through service rather than required to publish a proportional rate. Thus, even if *Consolidated Rendering* determined local rather than proportional rates to the border, it is possible that the Commission would regard them as a reasonable charge for the American portion of the international through shipments involved here. That, of course, is a matter for the Commission to determine on remand.

charged under those rates from the divisions that they in fact received on the shipments which traveled under the joint rates, the district court should enter judgment for respondents. If it turns out that *Consolidated Rendering* involved local rates not appropriate for a through service of this nature, the Commission should on remand proceed to determine the maximum reasonable American proportional rates for the shipments in question, and award the shipper as reparations the difference between those maximum rates and the divisions received by the defendant carriers, assuming the divisions are larger.[20]

We recognize the heavy burden that rests upon us in arguing that a decision of this Court[21] should be re-examined and its principles substantially modified. We believe, however, that such a re-examination is warranted in the present circumstances. The legal considerations that we have canvassed in this brief argue decisively, we submit, against the course adopted by the Commission in this area. There are also impressive practical and equitable considerations—and considerations of comity among friendly nations as well—which argue for the result we urge. A determination that a joint through international rate or a combination of proportional rates for a through international shipment is unlawful requires

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[20] We regard as irrelevant, as did the Commission, the fact that at the time of the shipments in question respondents maintained rates to the border, even assuming they were proportional rates (see n. 9, pp. 21–22, *supra*).

[21] *News Syndicate*. *Lewis-Simas-Jones* and *Sullivan*, which apply the same or similar principles, we regard as substantially derivative from *News Syndicate*.

the Interstate Commerce Commission to make a legal determination with respect to a transportation service provided by a foreign carrier in a foreign country. We do not believe that the Commission's knowledge and experience in railroad matters extends to foreign rail service, and we do not believe that it is seemly for the Commission to intervene in this fashion in the internal affairs of a friendly nation.

The scheme of reparations that we propose as consistent with—indeed as compelled by—the language and purpose of Section 1(1) of the Interstate Commerce Act will in some cases, perhaps, afford shippers a smaller recovery; in others a larger recovery will be possible. In all cases the shipper's burden of proving unreasonableness with respect to the foreign leg of the international trip will be eliminated. Our proposal will also, we believe, facilitate international rail commerce, by freeing American carriers from liability in respect of charges by foreign carriers over which they have no control,[22] as well as dispel the confusion and inconsistencies that have resulted from prior decisions in this field and have come to the fore in the present case.

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[22] Under the *News Syndicate* rule as interpreted by the Commission, an American carrier may limit its liability only by declining to enter into a joint through international rate and publishing, instead, a proportional rate to (and from) the border. *E.g.*, *Buckerfield's* v. *Atchison, T. & S. F. Ry.*, 280 I.C.C. 15, 18; *E. J. Stanton & Son* v. *Atchison, T. & S. F. Ry.*, 258 I.C.C. 315, 317. We do not think it sound public policy thus to deter the use of the flexible joint rate technique. See *Lewis-Simas-Jones*, 283 U.S. 654, 660 n.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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